

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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BANK OF AMERICA, N.A.

Case No. 3:16-cv-00135-MMD-VPC

v

Plaintiff,

ORDER

11 NORTH TRUCKEE TOWNHOMES
12 HOMEOWNERS ASSOCIATION, E. ALAN
TIRAS,

Defendants.

I. SUMMARY

16 This case concerns a homeowners association’s (“HOA”) foreclosure of property
17 within its development pursuant to Nevada Revised Statutes Chapter 116. Before the
18 Court are two motions filed by Defendant E. Alan Tiras (“Tiras”): (1) motion to dismiss
19 (“Motion to Dismiss”) (ECF No. 29) and (2) motion for sanctions (“Motion for Sanctions”)
20 (ECF No. 43). The Court has reviewed Plaintiff Bank of America, N.A.’s (“BANA”)
21 respective responses (ECF Nos. 38, 44) and Tiras replies (ECF Nos. 39, 45). For the
22 reasons discussed below, the Court grants Tiras’s Motion to Dismiss and denies Tiras’s
23 Motion for Sanctions.

II. BACKGROUND

A. Statutory Framework

26 In 1991, the Nevada legislature created the HOA lien statute found in Nevada
27 Revised Statute Chapter 116. *SFR Investments Pool 1 v. U.S. Bank*, 334 P.3d 408, 410
28 (Nev. 2014). The statute allows an HOA to place a lien on a residential unit within its

1 common-interest community for any assessment levied against that residential unit.¹ See
2 NRS § 116.3116(1) (2011).² Once the HOA places a lien on the residential unit, the statute
3 makes the HOA's lien prior to all other liens and encumbrances on the unit, except for:
4 (a) liens and encumbrances recorded before the recordation of the declaration that
5 creates the HOA; (b) a first security interest on the unit recorded before the date where
6 the assessment sought by the HOA became delinquent; and (c) liens for real estate taxes
7 and other governmental assessments against the unit. See NRS § 116.3116(2). However,
8 the statute creates a partial exception—an exception to the exception—regarding the
9 priority of a first security interest, e.g., a mortgage, recorded before the date of an
10 assessment delinquency:

11 *The [HOA] lien is also prior to all security interests described in paragraph*
12 *(b) to the extent of any [maintenance and nuisance-abatement] charges*
13 *incurred by the association on a unit pursuant to NRS 116.310312 and to*
14 *the extent of the assessments for common expenses [i.e., HOA dues] based*
15 *on the periodic budget adopted by the association pursuant to NRS*
16 *116.3115 which would have become due in the absence of acceleration*
17 *during the 9 months immediately preceding institution of an action to*
18 *enforce the lien, unless federal regulations adopted by the Federal Home*
19 *Loan Mortgage Corporation or the Federal National Mortgage Association*
20 *require a shorter period of priority for the lien... This subsection does not*
21 *affect the priority of mechanics' or materialmen's liens, or the priority of liens*
22 *for other assessments made by the association.*

18 *SFR Investments*, 334 P.3d at 410-11 (citing NRS §116.3116(2)) (emphasis added in
19 original). In other words, this statutory provision allows the HOA to split its lien into two
20 pieces: a superpriority piece and a subpriority piece. The superpriority piece of the HOA's
21 lien consists of the last nine months of unpaid HOA dues as well as maintenance and
22 nuisance-abatement charges. *Id.* at 411. Pursuant to the statute, this superpriority piece

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¹The statute defines "common-interest community" as "real estate described in a
24 declaration with respect to which a person, by virtue of the person's ownership of a unit,
25 is obligated to pay for a share of real estate taxes, insurance premiums, maintenance or
improvement of, or services or other expenses related to, common elements, other units
or other real estate described in that declaration." NRS § 116.021(1) (2011).

26 ²Nevada Revised Statute Chapter 116 has been amended several times since 2011. In
27 2015, NRS 116.3116 was amended and reorganized. 2015 Nev. Stat. 1331, 1334. Unless
28 otherwise indicated, references to NRS Chapter 116 are to the 2011 version of the statute
because the foreclosure in this case occurred in December 2011.

1 is prior to a first deed of trust.³

2 The HOA foreclosure process, NRS §§ 116.31162 - 116.31168, requires an HOA
3 to first notify the owner of the residential unit of the delinquent assessments. NRS §
4 116.31162(1)(a). If the owner does not pay within 30 days of this notice of delinquent
5 assessment, then the HOA may record a notice of default and election to sell. NRS §
6 116.31162(1)(b). The homeowner must then be allowed 90 days to pay off the amount of
7 the lien, including costs, fees and expenses incident to enforcement. NRS §
8 116.31162(1)(c). If the lien is not paid off in this time, then the HOA may proceed with the
9 sale.

10 A security interest holder is entitled to notice only if it has notified the HOA, before
11 the mailing of the notice of sale, of the existence of the security interest. NRS §
12 116.311635(1)(b)(2). Specifically, the HOA is required to provide not only the homeowner
13 with notice of default and election to sell, but it must also notify “[e]ach person who has
14 requested notice pursuant to NRS 107.090 or 116.31168(1)” and “[a]ny holder of a
15 recorded security interest encumbering the unit’s owner’s interest who has notified the
16 association, 30 days before the recordation of the notice of default, of the existence of the
17 security interest.” NRS §§ 116.31163(1) - (2). If a holder of a recorded security interest
18 encumbering the residential unit owner’s interest has notified the HOA more than 30 days
19 before the notice of default is recorded, the association “or other person conducting the
20 sale” must mail by first-class mail a copy of the notice of default and election to sell within
21 10 days of the notice being recorded. NRS § 116.31163(2). Absent a holder of a recorded
22 security interest’s compliance with these “opt-in” notice requirements, the HOA may
23 proceed with a non-judicial foreclosure sale in the event that the homeowner has still
24 failed to remedy the delinquent assessments.

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27 28 ³By contrast, the subpriority piece consists of all other HOA fees or assessments
and is subordinate to the first deed of trust.

1 **B. Relevant Facts**

2 The following facts are taken from the Complaint. (ECF No. 1.)

3 In November 2009, Melissa Henderson obtained refinancing from BANA ("the
4 Loan"). The loan was evidenced by a promissory note and secured by a deed of trust
5 ("DOT") encumbering the property located at 3168 N. Truckee Lane in Sparks, Nevada
6 ("the Property"). The Property is within the North Truckee Townhomes Homeowners
7 Association ("North Truckee"). MERS subsequently assigned the DOT to BANA.

8 On February 17, 2011, North Truckee recorded a notice of delinquent assessment
9 lien in the amount of \$1,018.58.⁴ On April 26, 2011, North Truckee recorded a notice of
10 default and election to sell to satisfy the delinquent assessment lien. The notice stated
11 that the total amount due to North Truckee was \$1,888.58, but did not indicate whether
12 that amount included dues, interests, fees and collection costs. On October 25, 2011,
13 North Truckee recorded a notice of HOA sale, which was scheduled for December 5,
14 2011. The notice also stated that the amount due to North Truckee was \$3,553.58, which
15 included fees, assessments and other charges.

16 On May 23, 2011, MERS as nominee, requested a ledger from North Truckee that
17 would provide information to enable the servicer of the Loan to satisfy the super priority
18 portion of the HOA lien. North Truckee refused.

19 North Truckee foreclosed on the Property on December 5, 2011. Tiras wrote in the
20 foreclosure deed that the sale price was \$4,713.58, which was less than 5% of the value
21 of the unpaid principal balance on the Loan.

22 BANA asserts three claims against Tiras and North Truckee: (1) quiet
23 title/declaratory judgment; (2) breach of NRS § 116.1113; and (3) wrongful foreclosure⁵.
24 (ECF No. 1 at 6-13.) Tiras seeks dismissal of all three claims.

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26 ⁴The Complaint alleges that North Truckee performed the acts identified in this paragraph
27 "through its agent Tiras." (ECF No. 1 at 4-5.)

28 ⁵BANA also asserts a fourth claim for injunctive relief against North Truckee. (ECF No. 1
at 14.)

1 **III. MOTION TO DISMISS (ECF No. 29)**

2 **A. Legal Standard**

3 A court may dismiss a plaintiff's complaint for "failure to state a claim upon which
4 relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pleaded complaint must provide
5 "a short and plain statement of the claim showing that the pleader is entitled to relief."
6 Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While
7 Rule 8 does not require detailed factual allegations, it demands more than "labels and
8 conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v.*
9 *Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555.) "Factual allegations
10 must be enough to rise above the speculative level." *Twombly*, 550 U.S. at 555. Thus, to
11 survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a
12 claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (internal citation omitted).

13 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to
14 apply when considering motions to dismiss. First, a district court must accept as true all
15 well-pleaded factual allegations in the complaint; however, legal conclusions are not
16 entitled to the assumption of truth. *Id.* at 678-79. Mere recitals of the elements of a cause
17 of action, supported only by conclusory statements, do not suffice. *Id.* at 678. Second, a
18 district court must consider whether the factual allegations in the complaint allege a
19 plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff's
20 complaint alleges facts that allow a court to draw a reasonable inference that the
21 defendant is liable for the alleged misconduct. *Id.* at 678. Where the complaint does not
22 permit the court to infer more than the mere possibility of misconduct, the complaint has
23 "alleged—but it has not show[n]—that the pleader is entitled to relief." *Id.* at 679 (internal
24 quotation marks omitted). When the claims in a complaint have not crossed the line from
25 conceivable to plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at 570.

26 A complaint must contain either direct or inferential allegations concerning "all the
27 material elements necessary to sustain recovery under some viable legal theory."
28 *Twombly*, 550 U.S. at 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101,

1 1106 (7th Cir. 1989) (emphasis in original)).

2 **B. Analysis**

3 Tiras seeks dismissal based on several grounds. The Court finds that the first
4 ground—the conduct complained of was taken in Tiras’ role as attorney for Townhomes—
5 is dispositive of the Motion. The Court thus declines to address the remaining arguments

6 Tiras contends that it was acting solely as the attorney for North Truckee and that,
7 in overseeing the foreclosure sale, it did not owe a duty to anyone other than its client,
8 North Truckee. (ECF No. 29 at 7-9.) The acts that Tiras allegedly performed as North
9 Truckee’s agent include: recording a notice of delinquent assessment lien; recording a
10 notice of default and election to sell to satisfy the delinquent assessment lien; recording
11 a notice of the HOA sale; refusing to provide a ledger from North Truckee to MERS. (ECF
12 No. 1 at 4-5.)

13 BANA responds that Tiras was acting not as North Truckee’s attorney but as the
14 non-judicial foreclosing trustee who conducted the foreclosure sale. (ECF No. 38 at 4-5.)
15 BANA relies on *Shannon v. ReconTrust Co.*, No. 3:11-cv-908-RCJ-WGC, 2012 WL
16 1695664, at *1 (D. Nev. May 11, 2012), to support its contention that as a trustee in a
17 non-judicial foreclosure sale, Tiras acted as the agent for both the trustor and beneficiary.
18 (See ECF No. 38 at 5.) However, *Shannon v. ReconTrust Co.* involved a non-judicial
19 foreclosure sale executed under NRS § 107.080 *et seq.* where the trustee under a deed
20 of trust initiated the foreclosure sale against a homeowner/mortgagor/trustor on behalf of
21 the mortgagee/beneficiary. Comparison of the foreclosure of a statutorily created HOA
22 lien to the foreclosure of a deed of trust is inapposite; a deed of trust establishes a
23 triangular relationship whereby a trustee acts on behalf of a mortgagee/beneficiary and
24 owes duties to the mortgagor/trustor under NRS § 107.080 *et seq.* By contrast, NRS §
25 116.3116 *et seq.* contemplates a unique situation whereby a non-judicial foreclosure sale
26 is conducted by an HOA, as holder of a superpriority lien established by statute, against
27 the interest of the owner of the residential unit who is delinquent in payment of HOA
28 assessments and other fees. Nowhere in NRS §§ 116.3116 through 116.3117, which

1 establishes the HOA superpriority lien and the foreclosure process, does the statute
2 mention a “trustee.” Thus, characterizing an entity performing an HOA foreclosure sale
3 on behalf of an HOA as a “trustee” mischaracterizes the relationship established under
4 NRS Chapter 116 between the HOA and the owner of a residential unit.

5 BANA also argues that Tiras owes BANA a duty of good faith because BANA is a
6 third party beneficiary to North Truckee’s CC&Rs. (ECF No. 38 at 5.) However, BANA
7 does not allege that Tiras is a party to the CC&Rs. The CC&Rs do not create a
8 relationship between BANA and Tiras, let alone imposes a duty of good faith.

9 In sum, the Court agrees with Tiras that as attorney for North Truckee in
10 undertaking the activities to foreclose on the HOA, Tiras owed no duty to BANA upon
11 which BANA can seek to impose liability upon Tiras. See *Pennymac Loan Services, LLC*
12 v. *Townhouse Greens Ass., Inc.*, Case No. 3:16-cv-00504-MMD-VPC, 2017 WL 2951426
13 (D. Nev. July 10, 2017) (dismissing claims against law firm who acted as an agent of the
14 HOA in conducting foreclosure sale on the HOA lien).

15 **IV. MOTION FOR SANCTIONS (ECF No. 43)**

16 Tiras seeks sanctions under Fed. R. Civ P. 11, contending that the Complaint is
17 frivolous. (ECF No. 43.) While the Court grants Tiras’s Motion to Dismiss, the Court does
18 not find that BANA’s claims against Tiras are frivolous. There exists at least one case in
19 the District of Nevada where the court implicitly held attorneys acting on behalf of an HOA
20 to be a party to a claim for quiet title. See, e.g., *Bayview Loan Servicing, LLC, v. Alessi &*
21 *Koenig, LLC et al.*, 962 F. Supp. 2d 1222 (D. Nev. 2013); *Bank of New York Mellon v.*
22 *Highland Ranch Homeowners Ass’n et.al.*, No. 3:16-cv-00436-RCJ-WGC (D. Nev. Dec.
23 6, 2016). For these reasons, the Court denies Tiras’s Motion for Sanctions.

24 **V. CONCLUSION**

25 The Court notes that the parties made several arguments and cited to several
26 cases not discussed above. The Court has reviewed these arguments and cases and
27 determines that they do not warrant discussion as they do not affect the outcome of
28 Tiras’s motions.

1 It is therefore ordered that Tiras's Motion to Dismiss (ECF No. 29) is granted and
2 its Motion for Sanctions (ECF No. 43) is denied.

3 The Clerk is directed to enter judgment in favor of Tiras in accordance with this Order.

4 DATED THIS 28th day of August 2017.



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6 MIRANDA M. DU
7 UNITED STATES DISTRICT JUDGE

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